UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 04-12-P-S***
	)	
ROBERT BROWN, III,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

Robert Brown, charged with knowingly and intentionally distributing cocaine in violation of 21 U.S.C. § 841(a)(1), seeks to suppress any statements made to law enforcement officers on January 21, 2004. Indictment (Docket No. 11); Motion to Suppress, etc. ("Motion") (Docket No. 24) at [1], [3]. An evidentiary hearing was held before me on May 11, 2004 at which the defendant appeared with counsel. The government called three witnesses and introduced one exhibit, which was admitted without objection. The defendant called one witness, himself, and offered no exhibits. Counsel for the defendant argued orally, and briefly, at the close of the hearing. Based on the evidence adduced at the hearing, I recommend that the following findings of fact be adopted and that the motion to suppress be denied.

I. Proposed Findings of Fact

On January 20, 2004 special agent Daniel Rousseau of the Drug Enforcement Agency, in the course of an investigation of drug trafficking at Pharos House, a halfway house in Portland, Maine used for the transition of federal prisoners back into the community, made a controlled purchase from the defendant through a confidential informant. On January 21, 2004 he went with a team of agents to Pharos House,

where the defendant resided, to execute two arrest warrants and a search warrant for the defendant's room. They arrived around 6:30 p.m. Included in the team were Karen Moody, supervising United States probation officer, and deputy United States Marshal John Barrone.

Rousseau waited in the lobby while Barrone, Moody and deputy United States Marshal Michael Galvin went to the defendant's room to arrest him. When the officers arrived, the defendant was asleep. The defendant was wearing a sweat suit. While effecting the arrest, the defendant's hands were placed in handcuffs behind his back. He was then brought to his feet and escorted down the stairs. The defendant asked the arresting officers what was going on, but they did not tell him. He knew that he was under arrest. Between five and ten minutes elapsed from the time the officers went to the defendant's room and the time they brought him downstairs.

Rousseau, Barrone and Moody went into an office at Pharos House with the defendant. Rousseau began talking with the defendant around 7:00 p.m., within 10 minutes of the time at which the defendant had been awakened. He identified himself and told the defendant the nature of the charge against him. The defendant said repeatedly that he did not want to go back to jail and that he had only a few days left at Pharos House. He also said repeatedly that he had "screwed up." Rousseau told the defendant that he was willing to talk with the defendant if the defendant was willing to help himself out. He told the defendant that the defendant was going back to jail but that Rousseau would report any cooperation the defendant provided to the government. He said that cooperation would be in the defendant's best interest. Rousseau also obtained general biographical information from the defendant. After 10 to 20 minutes of this kind of conversation, Rousseau pulled a card from his credentials case from which he read the defendant his *Miranda* rights. A copy of the card is Government Exhibit 1. The defendant said that he understood his rights and waived them.

The defendant said that he had not been selling drugs out of Pharos House. He said that he did not distribute drugs but that he knew people at the Eastland Hotel who could provide drugs and on a couple of occasions had brought individuals to those people to get drugs. When asked about the events of the previous day, the defendant said that he had only brought drugs to the confidential informant as directed by the actual seller, one Cram. The defendant never said that he did not want to talk with Rousseau or indicated in any other manner that he wanted to terminate the interview. He was allowed to call his girlfriend, whom he told that he was trying to help himself out. He also made a telephone call at Rousseau's request in an attempt to set up another controlled drug buy. The interview lasted between 30 minutes and one hour. At no time during the interview did the defendant appear confused, disoriented or sleepy. He was alert and attentive.

The defendant testified that he was confused when the officers entered his room and woke him. He testified that Rousseau told him at this time that he was under arrest for trafficking in drugs; that he was taken from his room to a van outside Pharos House, where he was questioned by Rousseau in Barrone's presence for 15 minutes; that he did not understand some of what Rousseau was saying because he was "shocked and confused;" that Rousseau said that the defendant was involved in the sale of drugs out of Pharos House, which the defendant denied; that he knew some of the names mentioned by Rousseau; and that, after Rousseau asked the defendant to make a call to room 600 in the Eastland Hotel, the defendant was brought into an office in Pharos House. Once in the office, the defendant testified, Rousseau pulled a card from his wallet and began to read the defendant his rights, but was interrupted by a knock on the door and left the room. When Rousseau returned, the defendant testified, he directed the defendant to make the call. The defendant testified that Rousseau never completed reading the defendant his rights and that the defendant never waived his rights. He said that he made the call at Rousseau's request because Rousseau

said that they were going to break down the door to the room anyway and the defendant feared that whatever was found in the room would be "put on" him.

The defendant also testified that he had been convicted of two felonies but had never been advised of his *Miranda* rights, although he acknowledged that he knew of and understood those rights. He denied telling Rousseau that he had transferred drugs for others and stated that Rousseau was "yelling and carrying on" during the interview and had misinterpreted everything that the defendant had said.

To the extent that the defendant's testimony conflicts with the testimony of Rousseau, Barrone and Moody, I find the agents' testimony credible and the defendant's not credible.

II. Discussion

The defendant contends that his statements on January 21, 2004 were involuntary because he was "unable to resist the police pressure," Motion at [3], and because he was questioned immediately after being awakened from sleep and could not give a valid waiver shortly after being awakened. He also contends that he was not given the required *Miranda* warnings before he made the statements at issue. Motion at [3]. I will address the latter argument first.

I find credible the testimony of Rousseau and Moody that Rousseau informed the defendant of his rights as required by *Miranda v. Arizona*, 384 U.S. 436, 467-73 (1966). I find credible the testimony of Rousseau, Barrone and Moody that the defendant indicated at the time that he understood those rights and waived them. I do not find credible the defendant's testimony that Rousseau did not inform him of all of his rights under *Miranda* and that he did not waive those rights.

With respect to the defendant's other arguments, he offers no citation to authority to support his contention that some unspecified yet critical period must pass after an individual is awakened from sleep before his waiver of *Miranda* rights and inculpatory statements may be considered voluntary as a matter of

law. According to the testimony of Rousseau, Barrone and Moody, at least 10 minutes and perhaps as many as 30 minutes passed between the time when the defendant was awakened and the time when he was given the *Miranda* warnings.

In order for a defendant's inculpatory statements to be admissible, the United States must establish by a preponderance of the evidence that he "voluntarily, knowingly and intelligently" waived his right to remain silent and to speak with counsel. *Lego v. Twomey*, 404 U.S. 477, 484-86 (1972) (establishing preponderance standard); *Miranda*, 384 U.S. at 444. The voluntariness of a waiver depends on the totality of the circumstances. *Arizona v. Fulminante*, 499 U.S. 279, 286 (1991). The United States must demonstrate that the defendant's will was not overborne and that his decision to speak was freely and voluntarily made. *Bryant v. Vose*, 785 F.2d 364, 367-68 (1st Cir. 1986). Relevant considerations include "both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (discussing voluntariness standard in context of consent to search).

The government must show that, based on the totality of the circumstances, the investigating agents neither "broke" nor overbore the defendant's will, *Chambers v. Florida*, 309 U.S. 227, 240 (1940), and that his statements were "the product of a rational intellect and a free will," *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). As this language suggests, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Coercive police activity may include either the creation of a susceptible psychological state in the person interrogated, *Townsend v. Sain*, 372 U.S. 293, 307-08 (1963), or the exploitation of an existing psychological condition, *Blackburn*, 361 U.S. at 207-08. "In the context of the voluntariness of a confession, a defendant's mental state by itself and apart from its relation to official coercion never disposes of the inquiry into constitutional voluntariness." *United States v. Palmer*, 203 F.3d 55, 61-62 (1st Cir. 2000). In this

case, the only evidence on this point is the defendant's testimony that Rousseau was "yelling and carrying on" while questioning him and that the defendant was "shocked and confused" following his awakening and arrest. This testimony is contradicted by that of Rousseau, Barrone and Moody, all of whom testified that the defendant was alert and attentive while being questioned and did not appear confused or sleepy. In addition, Barrone and Moody testified that the defendant was calm throughout the interview. I credit the testimony of the government witnesses on this point.

Even if the defendant's testimony were credited, however, it does not provide evidence of conduct by Rousseau or any other law enforcement professional present at the relevant time that could reasonably be construed as coercive.[1] *See, e.g.*, *Connelly*, 479 U.S. at 165 (citing cases in which defendant was insane at time of confession and officers conducted 8- to 9-hour sustained interrogation in tiny room filled with police officers, with confession composed by officer rather than defendant; and in which police gave defendant a drug with truth-serum properties). Nor could the fact that the plaintiff had awakened from sleep as little as ten minutes before the interview, without more, suffice to establish that he was in a "susceptible psychological state" at the time of the interview. *United States v. Turner*, 926 F.2d 883, 888 (9th Cir. 1991) ("Merely awakening a suspect to arrest him is not coercive conduct;" statements are not involuntary solely because made when defendant had just been awakened). The defendant's testimony in this case is easily distinguishable from the facts in *Mincey v. Arizona*, 437 U.S. 385 (1978), on which he relies. In that case, the defendant "had been seriously wounded just a few hours earlier," had "arrived at the hospital 'depressed almost to the point of coma,'" was in the intensive care unit, was suffering "unbearable"

[1] Whether the interview took place only in an office, as all of the government witnesses testified, or first in a van and then in an office, as the defendant testified, has no bearing on this issue. Once the defendant was arrested and handcuffed, which all agree happened before he spoke with Rousseau, a van would present an atmosphere no more inherently coercive than an office for purposes of interviewing the defendant.

pain, was "evidently confused and unable to think clearly" as evidenced by his incoherent written answers to questions, and was "lying on his back on a hospital bed, encumbered by tubes, needles, and breathing apparatus." *Id*. at 398-99. This is a far cry from being "confused and shocked" when arrested upon awakening.

The testimony that Rousseau was "yelling and carrying on," without more, does not establish coercion. *McCall v. Dutton*, 863 F.2d 454, 459-60 (6th Cir. 1988). There is no evidence that Rousseau threatened the defendant in any way. The only specific statement attributed to Rousseau by the defendant that might have any bearing on this issue is a statement to the effect that the officers were going to kick in the door of the hotel room "with or without" the defendant, but since that room was not the defendant's room and the intended action was to kick in the door whatever the defendant did, no threat to the defendant is inherent in the reported statement.

In addition, the defendant's own testimony established that he had the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights and the consequences of waiving those rights. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). The totality of the circumstances in this case requires denial of the defendant's motion to suppress.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to suppress be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of May, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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